

### § 33.19

- (b) The ALJ has the authority to:
- (1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;
  - (2) Disqualify a non-attorney representative (designated as described in the §33.2 definitions of “representative”) if the ALJ determines that the representative is incapable of rendering reasonably effective assistance;
  - (3) Continue or recess the hearing in whole or in part for a reasonable period of time;
  - (4) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;
  - (5) Administer oaths and affirmations;
  - (6) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;
  - (7) Rule on motions and other procedural matters;
  - (8) Regulate the scope and timing of discovery;
  - (9) Regulate the course of the hearing and the conduct of representatives and parties;
  - (10) Examine witnesses;
  - (11) Receive, rule on, exclude, or limit evidence;
  - (12) Upon motion of a party, take official notice of facts;
  - (13) Upon motion of a party, decide cases, in whole or in part, by summary judgment if there is no disputed issue of material fact;
  - (14) Conduct any conference, argument, or hearing on motions in person or by telephone; and
  - (15) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.
- (c) The ALJ does not have the authority to find Federal statutes or regulations invalid.

(Authority: 31 U.S.C. 3803(g))

### § 33.19 Prehearing conferences.

- (a) The ALJ may schedule prehearing conferences as appropriate.
- (b) Upon the motion of any party, the ALJ shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.
- (c) The ALJ may use prehearing conferences to discuss the following:

### 34 CFR Subtitle A (7–1–02 Edition)

- (1) Simplification of the issues.
  - (2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement.
  - (3) Stipulations, admissions of fact or as to the contents and authenticity of documents.
  - (4) Whether the parties can agree to submission of the case on a stipulated record.
  - (5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument.
  - (6) Limitation of the number of witnesses.
  - (7) Scheduling dates for the exchange of witness lists and of proposed exhibits.
  - (8) Discovery.
  - (9) The time and place for the hearing.
  - (10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.
- (d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

(Authority: 31 U.S.C. 3803(g))

### § 33.20 Disclosure of documents.

- (a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under §33.4(b) are based, unless those documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of the documents.
- (b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in §33.5 is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to §33.9.

(Authority: 31 U.S.C. 3803(g)(3)(B)(ii), 3803(e))

### § 33.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying.

(2) Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact.

(3) Written interrogatories.

(4) Depositions.

(b) For the purpose of this section and §§33.22 and 33.23, the term “documents” includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained in this part may be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) *Motions for discovery.* (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion or a motion for protective order, or both, as provided in §33.24.

(3) The ALJ may grant a motion for discovery only if he finds that the discovery sought:

(i) Is necessary for the expeditious, fair, and reasonable determination of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under §33.24.

(Authority: 31 U.S.C. 3803(a)(3)(B)(ii))

(e) *Depositions.* (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena must specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in §33.8.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

(4) The party seeking to depose shall provide for the taking a verbatim transcript of the deposition, which the party shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

(Authority: 31 U.S.C. 3803(g)(3)(B)(ii))

### § 33.22 Exchange of witness lists, statements and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with §33.33(b). At the time these documents are exchanged, any party that is permitted by the ALJ to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, shall provide each other party with a copy of the specific pages of the transcript it intends to introduce.

(b) If a party objects, the ALJ shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided in paragraph (a) of this Section unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.